Founded in 1852
by Sidney Davy Miller

150 YEARS
1852-2002

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September 16, 2002

To: The Clerk of the Court:

From: Robert E. Lee Wright (P32279), Attorney and Mediator

Re: Proposed Amendments of Rules 2.401, 2.410, 2.506, and 7.213 of the Michigan Court Rules

Date: September 16, 2002

I am a neutral mediator, certified in both general civil and divorce matters. I write to express my concerns about, and urge the rejection of, certain aspects of the proposed amendments to MCR 2.410.

Failure to "participate in good faith"

A major concern with the proposed amendments is the addition of the words "*failure to participate in good faith*," especially in the proposed changes to Rule 2.410(D)(3)(a) and (b) which affect both general civil and domestic mediation. *See* MCR 2.410(A)(2). This may be the proverbial "camel's nose under the tent" leading to the erosion or destruction of the confidentiality that is vital to the mediation process.

Effect on Confidentiality

At present, a mediator's report on the mediation session is limited to the date of the mediation, the names of the participants, whether or not a settlement was achieved, and whether or not further sessions are contemplated. MCR 2.411(C)(3). In addition, MCR 2.411(C)(5) protects statements, both written and oral, made during the mediation process, thereby guaranteeing the parties that whatever they say in mediation will not come back to haunt them.

The confidentiality guaranteed by MCR 2.411(C)(5) protects parties and mediators alike. It encourages full and frank disclosure to the mediator and promotes candid

discussions among the parties. This level of candor sets mediation apart from other dispute resolution processes and is one of the keys to the success of the mediation process.

If trial courts are required to determine whether a party (or an attorney) mediated in good faith, they will almost certainly need to ascertain what was said and done in the mediation process. This will lead, inevitable, to disclosure of statements made by parties or attorneys who are alleged to have participated in bad faith. This will, in turn, eliminate the protections of MCR 2.411(C)(5) and having a devastating effect on the mediation process, since anything a party says may now be used against them as evidence of their bad faith.

For example, a defendant may be willing to admit that they were negligent and offer an apology to the plaintiff within the confines of the mediation room, but because they dispute the amount of damages, they may be unable to reach a settlement. The plaintiff could bring a motion under the proposed rule, claiming the defendant acted in bad faith by refusing to pay them the amount demanded and cite their admission of liability to support their claim of bad faith. To avoid this, the defendant's attorney will instruct them to refuse to admit liability or apologize. For some victims of negligence, the apology is more important than the money and the defendant's refusal to apologize will preclude a settlement and it is the apology that opens the door to a settlement.

Chilling Effect on Mediation

Imposing a good faith participation requirement could also lead to courts asking the mediator to report on whether the parties participated in good faith and even to testify as to what was said during the mediation. This could lead to claims against mediators who pledge to keep all statements made during mediation confidential. It would certainly have a chilling effect on the frank discussions that are so vital to the success of the mediation process.

Attorneys may choose to steer clear of the mediation process altogether, for fear of being accused of bargaining in bad faith and suffering a sanction that is not provided under other methods of dispute resolution. This, in turn, could destroy an alternative dispute resolution process that is not yet fully implemented in Michigan state courts and still needs encouragement from the bench and bar to become an accepted alternative to trial. Indeed, given the nascent stage of mediation in our state courts, I question whether there is the problem of bad faith negotiation in mediation has achieved such proportions as to require an amendment to a rule that has only been in effect for two years.

Increased Cost of Litigation

It is nearly impossible to determine whether someone participates in any mediation in "good faith" when the case does not settle. Many times, one participant simply believes that their legal position is so strong that there is no reason for them to compromise. Although they usually make a mistaken in assessing the strength of their case, they are sometimes accurate. Even when they make a mistake in gauging the cost/benefit of their position or in analyzing risks vs rewards, they are usually because they are simply not able to see the weaknesses in their position, a problem that mediators are trained to help them overcome.

In my experience, it is the rare case where a party just refuses to negotiate at all for no reason whatsoever. In the last 50 cases in which I have served as a mediator, I have only seen one or two instances where a party refused to participate in the negotiation process and in those cases, it was due to someone's inability to see the reality of their situation rather than a lack of good faith.

Domestic Relations Mediation

Since the amendment would apply to both general civil and domestic relations mediations, it would involve a judicial determination as to whether each a divorced or divorcing spouse participated in a mediation in good faith. Given the volatile emotions which enter into a divorce dispute, especially around issues concerning children, it is almost impossible to tell whether someone who refuses to budge on an issue is acting in bad faith or just so emotionally attached to the outcome they desire that they cannot compromise. In these cases especially, it would be unwise and inappropriate for a trial court to attempt to determine whether a spouse participated in the mediation in good faith.

Involuntary Participation

Currently, there is no express requirement to "participate in good faith," but parties may be ordered to attend a mediation session. MCR 2.410(C)(3). The proposed change would effectively permit a trial court to order an unwilling party to not only attend a mediation session, but also to participate "in good faith" even if they have no desire to settle their dispute and merely want their day in court. This is not advisable for several reasons.

There are some cases which are simply not appropriate for mediation. For instance, the desegregation cases which resulted in the abolition of apartheid in this

country needed to be tried, not mediated, in order to eliminate segregation in all of our schools, not just discrimination against one child in one school district.

There may be valid reasons for a party to refuse to negotiate. For instance, where they have a clear and undeniable claim for a valid debt and are not interested in compromising the amount of their claim. While I might find their refusal to bargain aggravating and short-sighted in view of the expense of a trial, a secured creditor may have other reasons to refuse to bargain, such as not wanting to set a precedent for other debtors or the risk that any concessions on their claim could violate some other agreements. Another example would be the divorcing spouse who refuses to compromise on parenting time with the children not out of bad faith, but out of love and affection for the children.

These examples point to the fact that the courts may be asked to spend even more time in determining whether a party participated in good faith, thus increasing the cost of litigation and further clogging the trial courts' dockets. Rather than promoting the use of mediation to resolve disputes, it could lead to fewer attorneys agreeing to mediation for fear of opening themselves to another avenue of attack from the opposing party.

Undermining the Work of the ADR Committee

Before mediation was introduced into the state courts through amendments to the court rules, an ADR committee was convened by the State Court Administrative Office to carefully consider and develop proposed rules. Although I did not serve on that committee, I understand that a significant debate over whether to permit trial judges to order unwilling parties to attend a mediation session was resolved in favor of allowing them to do so. The fact that a party would not be sanctioned for refusing to participate in the mediation session was instrumental in gaining support for the rule as adopted. The proposed amendment would undo the balance struck by the rules committee and would undermine the hard work of that committee. This, in turn, will make it less likely that busy practitioners will be willing to volunteer their time to serve on a committee if their recommendations will later be ignored or undermined.

Thank you for the opportunity to submit these comments. For the reasons stated, I urge the Court to refuse to adopt the proposed addition of the language "to participate in good faith" to MCR 2.410(D)(3)(a) and (b).

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